MALAYSIAN REPORTS

YEK TIENG SING & ORS. v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ismail Khan C.J.(Borneo) & Pawan Ahmad J.) April 2, 1971]

[Kuching — Federal Court Criminal Appeal No. 29 of 1970].

Criminal Law and Procedure — Trial — Certificate for trial under emergency regulations — Sufficiency of certificate — Emergency (Criminal Trials) Regulations, 1964, reg. 4.

The appellants appealed against their convictions for offences punishable under the Internal Security Act. The appellants had been tried before a judge on a certificate issued by the Director of Public Prosecutions under the Emergency (Criminal Trials) Regulations, 1964. The certificate merely stated the names of the accused. The principal ground of appeal was that the certificate of the director was inadequate and therefore the trial was a nullity.

Held, allowing the appeal: a certificate for the purpose of regulation 4 of the Emergency (Criminal Trials) Regulations, 1964, should state the offence and such particulars as to the time and place of the alleged offence as are reasonably sufficient to give notice of the matter in question. The certificate given in the present case was inadequate and the trial was therefore a nullity.

Form of certificate in *Sambasivam* v. *Public Prosecutor*[3] followed.

Cases referred to:-

(1) *Berwin* v. *Donohoe* (1915), 21 C.L.R. 1.

(2) *Gokulchand Dwarkadas Morarka* v. *R.* A.I.R. 1945 P.C. 82.

(3) *Sambasivam* v. *Public Prosecutor* [1950] M.L.J. 145: [1950] A.C. 458 at p. 461.

FEDERAL COURT.

C. T. Wong for the first appellant.

Chong Siew Chieng for the second appellant

Joseph Tang for the third appellant.

Jemuri bin Sarjan (Deputy Public Prosecutor) for the Public Prosecutor.

Azmi L.P.: We indicated at the last hearing that we would give our reasons for allowing the appeal later. We now proceed to give our reasons.

The three appellants were convicted on the following charges:

First: That you on 8th December, 1969, at 2330 hours or thereabout in the Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 273 dated 7th September, 1964, and by Sarawak L.N. (F) 162 dated 11th September, 1964, namely Sungei Tamin, 36th Mile Ulu Oya Road, Sibu, Sarawak, without lawful excuse had under your control firearms, to wit five shot-guns without lawful authority and that you thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960.

And secondly: That you on 8th December, 1969, at 2330 hours or thereabout in the Security Area as proclaimed by the Yang Di-Pertuan Agong by Federal L.N. 273 dated 7th September, 1964, and by Sarawak L.N. (F) 162 dated 11th September, 1964, namely Sungei Tamin, 36th Mile Ulu Oya Road, Sibu, Sarawak, without lawful excuse had under your control ammunition, to wit twenty-seven rounds of live cartridges without lawful authority and that you thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960.

and were sentenced to death.

They appealed to this court against the conviction and sentence on both charges on several grounds of appeal but with the agreement of counsel we proceeded to hear first their argument on the following grounds: -

(3) The certificate of the Director of Public Prosecutions under date of 24th March 1970 (page 4) was inadequate for the purpose of the regulations whereunder it was made, in that it did not specify the case or identify the offences for which the appellants were to be tried by the High Court under the provisions of the Emergency (Criminal Trial) Regulations 1964 and the trial was therefore a nullity."

The certificate purported to have been made under the provisions of regulation 4 of the said regulations of 1964 reads as follows: -

"Public Prosecutor v. 1. Yek Tieng Sing (f)
2. Luk Liong Kee (m)
3. Chew Ming Kong (m).

Certificate

In accordance with Regulation 4 of the Emergency (Criminal Trials) Regulations, 1964 as confirmed by section 6 of the Emergency (Essential Powers) Ordinance No. 1 of 1969, I hereby certify that the case of the Public Prosecutor versus YEK TIENG SING (f), LUK LIONG KEE (m) and CHEW MING KONG, is a proper case for trial in the High Court under these Regulations.

Dated at Kuching this 24th day of March, 1970.
Signed (TAN CHAW TONG)
Director of Public Prosecutions.
Sarawak."

It is convenient at this stage also to quote the said regulation 4, which reads as follows: -

"(4) Where a person is charged with any offence against any written law (whether committed before or after the commencement of these regulations) and the Public Prosecutor certifies in writing that the case is a proper one for trial under these regulations such case shall not be tried by a jury or by a judge with the aid of assessors but shall be tried by a judge without the aid of assessors and disposed of in accordance with the provisions of these regulations as set out in the first schedule hereto."

Counsel for the appellants did not refer us to any authority in support of the argument but merely pointed out that the certificate signed by the Director of Public Prosecutions, Sarawak, contained only the names of the three appellants and no reference was made to the offences with which they were to be charged and tried.

The learned deputy argued that the certificate was a sufficient compliance with the regulations although it merely gives the names of the appellants. He told us that as a matter of fact he handed over to the judge at the same time the certificate and the two said charges and the judge must therefore have the two charges in mind when he proceeded with the trial without the aid of assessors.

In any case the learned deputy public prosecutor cited to us *Berwin* v. *Donohoe*[1] a decision of the High Court of Australia which deals with the question of sufficiency of sanction to prosecute under the Trading with the Enemy Act 1914. In that case Berwin was charged with attempting to trade with the enemy, an offence contrary to the provisions of section 3 of the Act, and a prosecution for the offence would

require the sanction in writing of the Attorney-General. Berwin was convicted and he appealed to the High Court of Australia on several grounds and one of them was that the written consent of the Attorney-General was not in fact given to the initiation of the prosecution.

The Chief Justice and two members of the court allowed the appeal on the ground that there was no evidence before the magistrate upon which he could properly convict. They therefore went on to say that in the circumstances it was unnecessary to express any opinion as to the sufficiency of the authority to prosecute given by the Attorney-General.

The other three judges, dissenting, dismissed the appeal and in so doing dealt with the question of the sufficiency of the certificate signed by the Attorney-General.

The certificate in question was in these terms:

"The Attorney-General of the Commonwealth hereby consents to a prosecution being instituted against Arthur George Berwin for an offence against the Trading with the Enemy Act."

There is no mention of the section of the Act or any particulars of the offence alleged against Berwin. Both Isaacs J. and Higgins J. came to the view that the certificate was sufficient. In reference to the failure to mention the section of the Act, the learned judges thought that since there was no other section than section 3 requiring such consent there was therefore a presumption that the consent was given with reference to that section. They also pointed out that as no other prosecution or offence or challengeable conduct on the part of Berwin within the purview of the Act was suggested, also the fact that the consent was entrusted to the Crown Officer Donohoe who actually prosecuted the case, the consent was sufficient.

Isaacs J. also expressed the view that:

"If the defence definitely challenges the fact that the Attorney-General has examined the facts of that particular case, the prosecution may be put to prove that he has; but as I say no such challenge was made here. The objection was merely as to the form of the documents."

In other words, the learned judges were of the view that it was open to the prosecution to prove by extrinsic evidence that a particular consent applied to a particular case notwithstanding the fact that the Act requires the sanction to be in writing.

On this question, we think that we should refer to the case of *Gokulchand Dwarkadas Morarka* v. *The King*.[2] The question which their Lordships of the Privy Council had to decide was as to the sufficiency of a sanction to prosecute under the Cotton, Cloth and Yarn (Control) Order 1943. Section 23 of the Order provides that no prosecution for the contravention of any of the provisions of the said order shall be instituted without the previous sanction of the Provincial Government or any such officer of the Provincial Government not below the rank of district magistrate as the Provincial Government may by general or special order in writing authorise on his behalf. The relevant part of the sanction to prosecute is as follows: —

"*Resolution:* Government is pleased to accord sanction under cl. 23, Cotton, Cloth and Yarn (Control) Order, 1943, to the prosecution of Mr. Gokulchand Dwarkadas Morarka for breach of the provisions of cl. 18(2) of the said Order.

By Order of the Governor of Bombay,
(Signed)
Deputy Secretary to Government, Bombay.

To,

The District Magistrate, Sholapur."

It will be observed that this sanction specified the appellant as the person to be prosecuted and the clause of the order which he was alleged to have contravened but did not specify the acts of the appellant alleged to constitute such contravention. The question which arose for decision before the Privy Council was whether that sanction read with the evidence adduced at the trial constituted a compliance with the provision of section 23 of the said order. It will be relevant to point out at this stage that their Lordships considered in that case that they could also consider the evidence adduced at the trial in considering whether the sanction was sufficient or not. At page 84 Sir John Beaumont who delivered the judgment of the Privy Council said: —

"In their Lordship's view, in order to comply with the provisions of cl. 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since cl. 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of cl. 23. Under that clause sanction has to be given to a prosecution for the contravention of any of the provisions of the Order. A person could not be charged merely with the breach of a particular provision of the Order; he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution — that is, for having done acts which constitute a breach of the Order — that the sanction is required. In the present case there is nothing on the face of the sanction and no extraneous evidence, to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order, and the sanction is invalid."

In both the Australian and the Privy Council cases, the court was dealing with the question whether the sanction in each case was adequate. In our view, in the instant case we are dealing with a document of a graver consequence in that it would change the mode of trial by enabling a judge to try the case alone without the aid of assessors. Their Lordships of the Privy Council in the *Gokulchand Dwarkadas Morarka's* case appear to indicate that where the sanction has to be in writing the facts constituting the offence charged should be shown on the face of the sanction.

We appreciate this important difference that in the Indian case the sanctioning authority was the Government whilst in this instant case the certifying authority is the Director of Public Prosecutions who must be presumed to have gone into the facts of the case before he issued the certificate. Notwithstanding that we are of the opinion that the certificate for the purpose of regulation 4 must state the offence and such particulars as to the time and place of the alleged offence as are reasonably sufficient to give notice of the matter in question.

We notice in the case of *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[3] the certificate under regulation 7 of the Emergency (Criminal Trials) Regulations of 1948 signed by the deputy public prosecutor ran thus: —

"The Emergency (Criminal Trials) Regulations, 1948.

I, William Martin McCall, Deputy Public Prosecutor, in accordance with the provisions of section 7 of the Emergency (Criminal Trials) Regulations, 1948, hereby certify that the trial of Sivam alias Sambasivam s/o Narayanasamy on the following charges, namely: —

1. That he at about 10 a.m. on September 13, 1948, at Bukit Kepong, Muar, in the State of Johore, carried a .38 revolver which he was not duly licensed to carry, and he has thereby committed an offence punishable under regulation 4(1)(a) of the Emergency Regulations, 1948: and

2. That he at about 10 a.m. on September 13, 1948, at Bukit Kepong, Muar, in the State of Johore, had in his possession ten rounds of .38 ammunition without lawful authority therefor and he has thereby committed an offence punishable under regulation 4(1)(b) of the Emergency Regulations, 1948, is a proper case for trial under the said Regulations and I hereby designate Johore Bahru as the place where such trial shall be held.

Dated at Johore this 25th day of November, 1948.

(Sgd.) W. Martin McCall,
Deputy Public Prosecutor
for Solicitor-General."

We think that this practice should be followed except that the words "for Solicitor-General" should be omitted.

We therefore say that for reasons stated above the certificate in the instant case in merely stating the names of the accused on the face of it was inadequate and the trial was therefore a nullity.

Appeal allowed.

WEE KING HOCK & ORS. v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Pawan Ahmad J.) April 23, 1971]

[Kuching — Federal Court Criminal Appeal No. 26 of 1970].

Criminal Law and Procedure — Appeal — Lodgment of notice — Subsequent withdrawal of notice — Application to file fresh notice of appeal out of time — Special circumstances must exist before the court of appeal allows withdrawal of notice of abandonment — Federal Court (Criminal Appeals) (Transitional) Rules, 1964, r. 20.

Criminal Law and Procedure — Caution statements — Whether made voluntarily — Lumping together statements made by accused persons — Failure to consider them individually — Effect of.

Penal Code, ss. 34 & 420 — Cheating charge — "Did obtain this sum by dishonestly representing" — Whether sufficient to include allegation of inducement — Criminal Procedure Code (Sarawak Cap. 58) s. 142.

This was an appeal against the conviction of the appellants on a charge of cheating. The main ground of appeal related to the way in which the trial judge dealt with the caution statements. It was argued that they were not made voluntarily and that the learned judge had just lumped together the statements made by the accused.

One of the accused had originally filed a notice of appeal but subsequently he filed a notice of withdrawal of the appeal. He later applied to the Federal Court for leave to file a fresh notice of appeal out of time.

Held, dismissing the appeal: (1) the learned trial judge had fully and correctly gone into the question of law before admitting the caution statements. Although he did not specifically refer to the various parts of the statements and say in each case what part he would admit and against whom, he had in his judgment made it clear that in dealing with these caution statements he would not make use of any part of the statements which implicated another co-accused;

(2) there must be special circumstances before the appellate court could allow the withdrawal of a notice of abandonment of appeal and in this case there were no such special circumstances.

Case referred to:-

(1) *R.* v. *Healey* (1956) 40 Cr. App. R. 40.

FEDERAL COURT.

C. T. Wong for the appellants Nos. 1 & 4.

Joseph Tang for the appellants 2 and 3.

Denis Ong for the Public Prosecutor.

Azmi L.P.: We dismissed the appeals of the 2nd, 3rd and 4th appellants and indicated we would give our reasons later. Here now are our reasons.

The above four accused were convicted by the High Court at Sibu on the following charge:—

"That all of you between the 30th day of December 1969 and the 7th day of January 1970 at diverse places in Sibu including Kim Geok Coffee Shop 46 Sungei Antu, and the Esso Installation at Igan Road, acting together and in furtherance of the common intention of you all did cheat and thereby obtained $13,000 cash from Wong Chiong Hiong alias Wong Siong Hiong in that you did obtain this sum by dishonestly representing to the said Wong Chiong Hiong that in return for the said sum you would obtain for him valuable gold bars and you thereby committed an offence punishable under section 420 of the Penal Code read in connection with section 34 of the Penal Code."

and were sentenced to various terms of imprisonment namely the first accused to 33 months' imprisonment, the second accused to 24 months' imprisonment, the third accused to 25 months' imprisonment, the fourth accused to 25 months' imprisonment and in addition were also fined $500 each or 7 months' imprisonment in default. The appeal was against both conviction and sentence.

In reference to the first accused, however, he withdrew his appeal but applied to us at the last hearing for leave to file a fresh notice of appeal out of time. In his affidavit in support of his application he states as follows: —

"(5) On 14th September 1970 I lodged the notice of appeal with the Registrar of this Honourable Court.